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Supreme Court of the United States

No. 44—October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF THE DECISION BELOW.

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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF THE DECISION BELOW.

This brief is filed pursuant to Paragraph 9 of Rule 27 of the Rules of this Court. Written consents of all the parties hereto dated October 30, 1939, have been filed with the Clerk.

Preliminary Statement.

The fundamental question involved in the above case is the right of the City of New York to impose a City Sales Tax on certain sales in interstate and foreign commerce. The respondent alternatively claims immunity either under the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3) or under the Imports-Exports Clause (Art. I, Sec. 10, Cl. 2) (R. 8).

The *amici curiae* represent taxpayers whose cases are in all respects identical with the respondent's case above and with the respondent's case in No. 473, Gulf Oil Corporation. The disposition of these cases will directly affect the outcome of the *amici curiaes'* cases which are pending in the lower New York courts.

Reference is made to Respondent's Brief for proceedings below and statement of facts.

Summary.

1. The judgment below is founded on concurrent findings by State Courts that the transactions in question were interstate commerce and beyond the taxing power of the State. Particular weight must be given the findings below not only because they were against the State but also because the Court of Appeals adopted as the law of this case an opinion in a companion case in which the State's right was upheld.

2. The State Courts correctly held the sales tax to be a direct tax on interstate commerce.

(a) The rule so stated has been repeatedly declared by this Court and consistently ratified by Congress.

3. Respondent in this case is entitled to immunity under the Imports-Exports Clause in the event that its claim under the Commerce Clause is denied.

4. Respondent in this case is entitled to remand for decision of non-federal questions in the event that reversal is ordered on the federal questions.

ARGUMENT.

FIRST POINT.

REPEATED REFUSAL OF CONGRESS TO ENACT BILLS PERMITTING STATE TAXATION OF INTERSTATE AND FOREIGN COMMERCE MUST BE CONSTRUED AS CONGRESSIONAL APPROVAL OF THE DECISIONS OF THIS COURT.

The New York Courts below have concurrently found the imposition here in question to be on interstate commerce and have annulled a New York tax, on the unquestionable rule of this Court that the Commerce Clause forbids "a direct tax upon interstate commerce" (R. 304):

> "For more than a century, since *Brown* v. *Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia*, 103 U. S. 344; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Robbins* v. *Shelby County Taxing District*, *supra* [145 U. S. 1]; *Leloup* v. *Mobile*, 127 U. S. 640; *Brennan* v. *Titusville*, 153 U. S. 289; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Fisher's Blend Station* v. *State Tax Commission*, *supra* [297 U. S. 650]; *Adams Manufacturing Co.* v. *Storen*, *supra* [304 U. S. 307]. • • • During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been

left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock* v. *Bureau of Revenue, supra* [303 U. S. 250], 254, et seq., and cases cited."

Gwin, White & Prince Inc. v. *Henneford,* (1939) 305 U. S. 434, 441.

The rule has also been stated thus:

"The commerce clause itself, without action by Congress, is a charter of freedom in interstate and foreign commerce from State interference with repect to those activities which in view of their nature demand uniformity of regulation, if they are to be regulated at all. In such matters, the silence of Congress indicates that this freedom is to be left unimpaired. It is in this sense that it has been held that the States cannot impose what is deemed to be a 'direct burden' on interstate commerce. Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or upon the privilege of engaging in it, or upon the receipts, as such, derived from it, or upon persons or property in transit in interstate commerce. The States have no power to prohibit interstate trade in legitimate articles of commerce, or to discriminate against the products of other States, or to exclude from the limits of the State, corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on."

Hughes—*The Supreme Court of the United States,* 1928, pp. 145-6.

There have been numerous attempts, uniformly unsuccessful, to secure legislation to permit the result for which the petitioner here contends. At least as early as the 73rd Congress, 1st Session, there was introduced in the Senate the Long Bill (S. 1155) "To limit the effect of the regulation of commerce between the several states and with foreign countries." There have been at least fifteen of these bills introduced in Congress, all of which are set forth in Appendix A, Part 1, *infra*, pp. 11-13. The latest bill on this subject is the Colmer Bill (H. R. 1818, 76th Congress, 1st Session), having an identical purpose.

These bills have uniformly failed of passage.

Added to this, are four Memorials from the Legislatures of the States of Indiana, Minnesota, Tennessee and North Dakota, which are set forth in Appendix A, Part 2, memorializing Congress to enact legislation similar to the bills referred to here, *infra*, p. 14.

In the face of this Congressional history, a reversal of this or any of the companion cases would be tantamount to legislation by judicial fiat.*

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* The Harrison Bill (S. 2897, 73rd Congress, 2nd Session) passed the Senate but died in the House Committee under circumstances that strongly indicate that the original passage was under a misapprehension of the true nature of the bill. The Congressional history of this bill is set forth in full in Appendix A, Part 1, *infra*, p. 11. The debates in Congress (78th Cong. Rec., Part 5, pp. 4597-8) and the Report of the Committee on Interstate Commerce (Report No. 440, Senate Reports, 73rd Congress, 1st and 2nd Sessions) bear out the contention made at the hearings before the House Committee on Interstate and Foreign Commerce that such misapprehension existed (Statement of John C. Gall, p. 83, Interstate Sales Tax, Hearings of Feb. 26, March 28 and April 11, 1934).

SECOND POINT.

THE IMPOSITION OF THE NEW YORK CITY SALES TAX ON THE IMPORTATION AND EXPORTATION OF THE FUEL OIL PURCHASED BY RESPONDENT IS VIOLATIVE OF THE IMPORTS-EXPORTS CLAUSE.

Respondent, French Line, invoked Art. I, Sec. 10, Cl. 2 of the Constitution of the United States (R. 8). The New York Courts sustained respondent's claim of immunity under the Commerce Clause and did not pass on its distinct and clear immunity under the Imports-Exports Clause. Respondent's claim of immunity under that clause has been preserved and is an issue which must be adjudicated in the event that there is a reversal on the claim under the Commerce Clause. Petitioner's Brief does not discuss the point.

The pertinent portions of that clause are, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports * * * and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress" (Art. I, Sec. 10, Cl. 2).

Respondent's Brief, pages 29-46, carefully analyzes the testimony as to the importation of all the oil here in question, its temporary storage under actual or constructive custody of the United States, its bonded and Government

supervised transit from Government custody to the bunkers of French liners preparing for a quick "turn-around" (R. 295).

The rapid transportation of all the oil here in question through New York was a basis for the lower Courts' decisions under the Commerce Clause; the same factor requires a finding that both Imports and Exports were involved. Decisions cited by Respondent establish that the tax imposed was beyond the power of the State.

Companion cases also involve Art. I, Sec. 10 [Imports-Exports Clause]. Respondent's claim to immunity under that clause cannot be decided on the authority of Commerce Clause cases. The Imports-Exports Clause was adopted specifically to avoid levies of the kind here attempted.*

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* "A very material object of this power was the relief of the states which *import and export through other states*, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between state and state, it must be foreseen, that ways would be found out, to load the articles of *import and export, during the passage through their jurisdiction*, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured, by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity. To those who do not view the question through the medium of passion or of interest, the desire of the commercial states to collect, in any form, an indirect revenue from their uncommercial neighbours, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of an impatient avidity for immediate and immoderate gain." (Italics ours.)

The Federalist, No. 42, Madison, Jan. 22, 1788.

The obvious applicability of the Clause to the type of state taxation here in question has been restated by modern commentators.*

The Senate has recently evidenced awareness of the vitality and plain intendment of the Clause. [See First Point.] Memorials from four States seeking passage of National Legislation authorizing taxation of interstate commerce were presented in 1935 (Appendix A, part 2). The first two were referred to the Interstate Commerce Committee; the last two, however, were referred to the Committee on Finance, one by Senator Harrison, the author of the bill under consideration. The only reason for referring the Memorials to the Finance Committee was the realization that under Art. I, Sec. 10 "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States" (Art. I, Sec. 10, Cl. 2).

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* "It will be observed that the trend of modern cases is to hold that the congressional power over commerce given by the commerce clause (Clause 3, Section 8) alone is sufficient to negative and make unconstitutional any attempt by a state to tax either an import from a foreign country or an import from a sister state. The tendency of the decisions, in other words, is to leave Clause 2 of Section 10 ineffective, to make it meaningless, to deprive it of that full significance its length, position and actual language give to it. *If so it is a vestigial clause. Why not evolve it again into usefulness?* In fact, if the commerce clause has always had the efficacy it has now, this lengthy, distinctive language in Clause 2 never did have any usefulness. Surely the language giving the federal government the right to all net revenue has meaning. It certainly meets any objection that a state could fatten itself on taxes, and it implies that the clause may have been inserted for the purpose of handling the *New York provincialism of long ago.*" (Italics ours.)

Chambliss, at 30 Ill. Law Review, 829. See also "*Documents Illustrative of the Formation of a Unio.. f the American States,*" 1927, page 630.

Historians have described the painful lessons of New York's levies on imports from New Jersey and Connecticut in the year of the Constitution, *The Critical Period of American History*, John Fiske, c. IV, pp. 144-147, and the current press records a trend to similar conditions resulting from levies such as this.*

The Imports-Exports clause was drafted and adopted to prevent levies of the kind here imposed and should be enforced.

THIRD POINT.

THE SALES TAX IS NOT A "USE" TAX.

The belated assertion of Petitioner that the sales tax is a "use" tax is strikingly inconsistent with the introduction by the President of the New York City Council, in 1938, of a "compensating use tax," law which would replace the New York City Personal Property Tax Law, but not the Sales Tax Law.† The City administration perhaps proposed the new law before it decided to contend that the sales tax was a "use" tax.

FOURTH POINT.

RESPONDENT'S RIGHT TO LOCAL DECISION ON QUESTIONS OF LOCAL LAW MUST BE PRESERVED.

Respondent's petition (R. 7) asserts illegality under the State Enabling Act (Laws of 1934, ch. 873, see Petitioners'

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* A person is under arrest and held for trial in New York for bringing to New York three cartons of cigarettes purchased in New Jersey, admittedly for his own consumption, *City of New York* v. *Crain*, New York City Magistrate's Court, Municipal Term, No. 7767.

† Minutes of the New York City Council, June 21, 1938, p. 1305.

Appendix of Statutes, p. 22). The State courts did not pass on this issue, and, in the event of reversal on Federal grounds, this Court will remand for consideration of local questions. *State Tax Commission et al.* v. *Van Cott*, (1939) 306 U. S. 511.

LAST POINT.

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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City County and State
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December 30, 1939

APPENDIX A.

PART 1.

73rd Congress, 1st Session

Bill No.	*Introducer*	*Title*
S. 1155	Long	To limit the effect of the regulations of commerce between the several States and with foreign countries. Introduced 4/6/33. Referred to Committee on Interstate Commerce, 77 Cong. Rec., Part 2, p. 1324.
H. R. 3769	Reilly	To divest certain activities of their interstate character. Referred to Committee on Interstate and Foreign Commerce 3/17/33. 77 Cong. Rec., Part 2, p. 607.

73rd Congress, 2nd Session

H. R. 8231	Boehne	To regulate sales in interstate commerce. Referred to Committee on Interstate and Foreign Commerce 2/24/34. 78 Cong. Rec., Part 3, p. 3168.
S. 2897	Harrison	To regulate interstate commerce by granting the consent of Congress to taxation by the several States of certain Interstate Sales. Referred to Committee on Interstate Commerce 2/26/34. 78 Cong. Rec., Part 3, p. 3177; Reported with amendment and report (No. 440), 3/8/34, 78 Cong. Rec., Part 4, p. 3958; debated and passed 3/15/34, 78 Cong. Rec., Part 5, pp. 4597-4598; rec'd in House 3/20/34; referred to Committee on Interstate and Foreign Commerce, 78 Cong. Rec., Part 5, p. 4978.
H. R. 8303	Sadowski	To regulate sales in interstate commerce; 2/27/34 Referred to Committee on Interstate and Foreign Commerce, 78 Cong. Rec., Part 3, p. 3367.

Bill No.	*Introducer*	*Title*
H. R. 8913	Swank	To regulate interstate commerce by granting the con[illegible] of Congress to the several States to levy certain taxes upon property and capital employed, business done, and sales made in interstate commerce; limiting the power to levy such taxes to property and capital employed, business done, and sales consummated within such State; preventing double taxation; and preventing political subdivisions of any State from levying taxes or excises upon such property and capital employed, business done, and sales made in interstate commerce; 2/2/34 Referred to Committee on Interstate and Foreign Commerce, 78 Cong. Rec., Part 6, p. 5876.
	74th Congress, 1st Session	
H. R. 3971	Lea	To regulate sales in interstate commerce; Referred to Committee on Interstate and Foreign Commerce 1/14/35, 79 Cong. Rec., Part 1, p. 429.
S. 994	Harrison	To regulate sales in interstate commerce; Referred to Committee on Interstate Commerce, 1/15/35, 79 Cong. Rec., Part 1, p. 441.
	74th Congress, 2nd Session	
H. R. 12928	Lord	To divert certain activities of their interstate character; Referred to Committee on Interstate and Foreign Commerce 6/1/36, 80 Cong. Rec., Part 8, p. 8622.

75th Congress, 1st Session

Bill No.	*Introducer*	*Title*
H. R. 1619	Chandler	Relating to sales and contracts to sell in interstate and foreign commerce; Referred to Committee on Interstate and Foreign Commerce 1/15/37, 81 Cong. Rec., Part 1, p. 34.
H. R. 4214	Colmer	To regulate sales in interstate commerce; Referred to Committee on Interstate and Foreign Commerce 2/2/37, 81 Cong. Rec., Part 1, p. 741.
H. R. 4268	Lord	To divest certain activities of their interstate character; Referred to Committee on Interstate and Foreign Commerce 2/3/37, 81 Cong. Rec., Part 1, p. 820.
H. R. 7824	Chandler	Relating to sales of goods and contracts to sell goods in interstate and foreign commerce; Referred to Committee on Interstate and Foreign Commerce 7/12/37. 81 Cong. Rec., Part 6, p. 7089.

75th Congress, 2nd Session

H. R. 8550	Boren	To divest certain activities of their interstate character; Referred to Commerce on Interstate and Foreign Commerce 11/30/37, 82 Cong. Rec., Part 1, p. 584.
H. R. 1818	Colmer	To regulate sales in interstate commerce; Referred to Committee on Interstate and Foreign Commerce ..../..../39, 84 Cong. Rec., Part 1, p. 148.

APPENDIX A.

PART 2.

Memorial from Legislature of Minnesota seeking Congressional consent to State taxation of sales and gross income of interstate commerce. Referred to Committee on Interstate Commerce 3/12/35, 79 Cong. Rec., Part 3, p. 3428.

Memorial from Legislature of Indiana seeking passage of Harrison Bill (S. 2897, 73rd Cong., 2nd Session); Referred to Committee on Interstate Commerce 3/12/35, 79 Cong. Rec., Part 3, pp. 3427-8.

Memorial from Legislature of Tennessee seeking passage of Harrison Bill (S. 2897, 73rd Cong., 2nd Session); *Referred to Committee on Finance* 3/14/35, 79 Cong. Rec., Part 3, p. 3590.

Memorial from Legislature of North Dakota seeking passage of Harrison Bill (S. 2897, 73rd Cong., 2nd Session); *Referred to Committee on Finance* 3/18/35, 79 Cong. Rec., Part 3, p. 3802.

SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner,
vs.
Compagnie Generale Transatlantique.

On Writ of Certiorari to the Supreme Court of the State of New York.

[March 25, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

This is a companion case to No. 475, *McGoldrick* v. *Berwind-White Coal Mining Company*, decided January 29, 1940, brought here to review a judgment of the New York State Supreme Court that the New York City tax laid upon sales of goods for consumption, is an unconstitutional burden on interstate commerce.

Upon certiorari to review a determination by the Comptroller of the City of New York that respondent was subject to a New York City tax upon sales to it of fuel oil in 1934 and 1935, the Appellate Division of the New York Supreme Court held that the taxing statute as applied did so infringe. 254 A. D. 237. The Court of Appeals affirmed, 279 N. Y. 192, with opinion, on the single ground that the tax was unconstitutional by reason of its effect on interstate commerce, and by its amended remittitur the court stated that the affirmance was on the sole ground that the tax violated the commerce clause. 280 N. Y. 691. We granted certiorari, 307 U. S. 620, upon a petition which assailed the determination of the state court that the tax was a prohibited burden on interstate commerce, the question being of public importance.

The relevant provisions of the taxing act are set out in our opinion in the *Berwind-White Coal Mining Company* case, and need not be repeated here. The Appellate Division found facts not challenged here as follows: Appellant, a corporation of the Republic of France, owns vessels and operates them in the transportation of passengers and freight between the Port of New York and France, and other foreign countries. It is authorized to do business, and maintains an office in New York City, where in the course of its business it makes purchases of fuel oil for consumption in the operation of its vessels, from the Standard

Oil Company of New Jersey, which also maintains an office and carries on business in the City. That company enters into long-term contracts with the respondent, negotiated and signed in the City, for the sale to respondent of its requirements of fuel oil as ordered, to be delivered alongside respondent's vessels in New York Harbor. All the sales presently involved were of oil stored by the Standard Oil Company in its tanks in New Jersey, which as ordered were transported by barge to respondent's vessels in New York City where it was delivered.

The oil thus transported and delivered to respondent was of two types. One, "bonded fuel oil", is refined oil imported by the Standard Oil Company from foreign countries and stored in bond in New Jersey without payment of import duties, pursuant to the revenue laws of the United States which authorize release from the bond upon delivery of the oil to a foreign steamship for export or use as fuel by the vessel. The other type, known as "drawback oil", is the product of crude oil imported from foreign countries by the Standard Oil Company and refined at its New Jersey plant. An import duty is paid upon the oil, but upon delivery of the refined oil to a foreign steamship for export, or for use as fuel on the vessel, the importer is entitled under the revenue laws to a refund or drawback on the duty paid. 19 U. S. C. §§ 1309, 1313, 46 Stat. 690, 693.

So far as the validity of the tax with respect to the interstate commerce is concerned, our decision sustaining it in the *Berwind-White Coal Mining Company* case is controlling, and the judgment must be reversed, unless the state of the record is such as to entitle respondent to assail the tax upon constitutional grounds not urged or decided in the state courts.

Respondent's petition to the New York Supreme Court to review the determination of the Comptroller set out that the tax "was assessed upon the purchase price paid on transactions in interstate and foreign commerce" and that the City was "without power to impose said tax on said transactions by virtue of the provisions of the Constitution and the laws of the United States," specifying the commerce clause and Article I, § 10, Clause 2, prohibiting "imposts or duties on imports or exports". No mention was made of any applicable statute of the United States.

Respondent's brief and argument here advance as reasons in support of the judgment of the state court in its favor that the bonded

oil and drawback oil, at the time of delivery to respondent, retained their character as imports, and that they were then in process of being exported, so that the tax imposed upon the delivery to the purchaser is a prohibited impost or duty on imports and exports.

Respondent concedes by its brief that the contentions it now makes were not argued in the New York Court of Appeals, and does not deny petitioner's assertion here that respondent stated in its brief in the Appellate Division, "The court need give no attention to them", and that by its brief in the Court of Appeals respondent explicitly limited its presentation of the case to the interstate commerce point. Whether, under the practice of the Court of Appeals, respondent was in the circumstances free to ask decision of these questions there, we are not advised. But in any event the record does not disclose that they were presented to the Court of Appeals, the highest court of the state in which decision could have been had whose decision we review, and it shows that that court considered and passed upon only the interstate commerce question.

By virtue of the petition for certiorari addressed to the constitutional question which the state court decided, this Court has jurisdiction of the cause. And respondent, in urging decision here of the constitutional questions not pressed in the state court, relies on the familiar rule of appellate court procedure in federal courts that, without a cross-petition or appeal, a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision. *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435; *Langnes* v. *Green*, 282 U. S. 531. See *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 269.

But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225; *Duignan* v. *United States*, 274 U. S. 195, 200. In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance

with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. *Dewey* v. *Des Moines*, 173 U. S. 193; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Whitney* v. *California*, 274 U. S. 357, 362, 363; *N. Y. ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317.

Like considerations, we think, require us to refuse to entertain such new grounds of attack as a support for a state judgment of invalidity based on an erroneous construction of the Constitution. In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned.

Upon the remand of this cause for further proceedings not inconsistent with this opinion, the state courts will be free to decide any federal question remaining undecided here which, in conformity with their own procedure, may be raised for decision there, and the remand will be without prejudice to the further presentation of any such question to this Court.

Reversed.

The CHIEF JUSTICE and Mr. Justice ROBERTS concur in the view that the questions relating to foreign commerce are not properly before us in this case, but think that the judgment of the state court, holding that the tax as here laid places an unconstitutional burden upon interstate commerce, should be affirmed upon the grounds stated in the dissenting opinion in No. 475, *McGoldrick* v. *Berwind-White Coal Mining Company*.

Mr. Justice MCREYNOLDS and Mr. Justice MURPHY took no part in the consideration or decision of this case.